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TESTAMENTARY DISPOSITIONS IN FAVOR OF THE SURVIVING SPOUSE AND THE LEGITIME OF DESCENDANTS

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The surviving spouse in Louisiana is afforded a substantial measure of financial security by the community property system,¹ the legal usufruct under article 916 of the Civil Code of 1870,² and by the inheritance rights under articles 915 and 924 of the same Code.³ In addition, a widow in necessitous circumstances may claim under article 3252 of the Louisiana Civil Code of 1870 a privilege up to the amount of one thousand dollars from the succession of her husband;⁴ and the survivor in necessitous circumstances, widow or widower, may claim under article 2382, under certain conditions, the so-called marital portion from the deceased's estate.⁵

Quite apart from the protection accorded to the surviving spouse directly by the law, a spouse may, in the exercise of his or her testamentary freedom,⁶ provide for the survivor by will. But when a spouse has legitimate descendants who are not unworthy heirs, the spouse's testamentary freedom is limited by provisions safeguarding the legitime of the descendants.⁷

1. Upon the death of either spouse the community of acquets and gains terminates and the survivor is entitled to an undivided one-half of the community in perfect ownership. See LA. CIVIL CODE art. 2406 (1870); Comment, 25 LA. L. REV. 241 (1964).

2. See LA. CIVIL CODE art. 916 (1870); Yiannopoulos, *Legal Usufructs; Louisiana and Comparative Law*, 14 LOYOLA L. J. 1 (1968); Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181 (1943); Comment, 25 LA. L. REV. 873 (1965).

3. See LA. CIVIL CODE arts. 915, 924 (1870).

4. *Id.* art. 3252; cf. Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3, 43-44 (1959); Comment, 25 LA. L. REV. 259 (1964).

5. See LA. CIVIL CODE art. 2382 (1870), as amended, La. Acts 1926, No. 113; cf. Comment, 25 LA. L. REV. 259 (1964); Comment, 18 TUL. L. REV. 290 (1943); Comment, 2 LOYOLA L. J. 58 (1943); McMahon, *The Original Case of the Misunderstood Wife*, 11 LOYOLA L. J. 109 (1930).

6. See LA. CIVIL CODE arts. 484, 491, 1470 (1870).

7. *Id.* arts. 1493, 1499, 1710. See also Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 TUL. L. REV. 43 (1958); Lemann, *Some Aspects of Simulation in France and Louisiana*, 29 TUL. L. REV. 22, 47-59 (1954); Wisdom & Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119 (1952); Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 LA. L. REV. 42 (1941); Lazarus, *Disposable Portion and the Legitime*, 1 LOYOLA L. J. 69 (1941); Comment, 37 TUL. L. REV. 710 (1963); Comment, *Collation in Louisiana*, 26 TUL. L. REV. 203 (1952).

For the legitime of forced heirs in the light of trust law, see La. R.S. 9:1845 (1965); Oppenheim, *The Legitime in Trust*, 42 TUL. L. REV. 239 (1968); Pascal, *Some ABC's about Trusts and Us*, 13 LA. L. REV. 555, 566 (1953); *The*

The purpose of this article is to investigate the extent of testamentary freedom allowed by the law to a spouse leaving legitimate descendants and to ascertain the maximum benefits that may be conferred on the surviving spouse by will. Since the validity and effect of dispositions in favor of the surviving spouse may vary with the qualities of the testator's descendants as issues of the last or of a former marriage, the following discussion is divided into two parts. The first part deals with situations in which the testator is survived by his spouse and by issues of the marriage; the second part deals with situations in which the testator is survived by his spouse and by issues of a former marriage.

I. DISPOSITION IN FAVOR OF THE SURVIVING SPOUSE AND THE LEGITIME OF ISSUES OF THE MARRIAGE

When the forced heirs of a testator are issues of his last marriage, the validity and effect of dispositions in favor of the surviving spouse may vary with the nature of the property of the deceased. If the deceased's estate consists of separate property only, the maximum that the survivor may receive by will is the disposable portion in perfect ownership. If, however, the deceased's estate consists of his share in the community only, or of both separate and community property, the surviving spouse may receive additional benefits.

1. *Separate Property*

In the presence of forced heirs, descendants or ascendants, a testator whose estate consists of separate property only may give to the surviving spouse as well as to a stranger the disposable portion.⁸ Bequests in perfect ownership do not involve major difficulties. If the bequest in favor of the surviving spouse does not exceed the disposable portion, it will be given effect. If the bequest exceeds the disposable portion, it will be reduced to

Work of the Louisiana Supreme Court for the 1939-1940 Term—Trusts, 3 LA. L. REV. 267, 288 (1941); Nabors, *The Shortcomings of the Louisiana Trust Estates Act and Some Problems of Drafting Trust Instruments Thereunder*, 13 TUL. L. REV. 178, 294-05 (1939).

8. The disposable portion is determined by articles 1493 and 1494 of the Louisiana Civil Code of 1870. Article 1493 provides that donations inter vivos or mortis causa may not exceed two-thirds of the donor's property if there is one child, one-half if there are two children, and one-third if there are three or more children. Article 1494 provides that if the donor, having no children, leaves a father, a mother, or both, donations may not exceed two-thirds of the donor's property.

that portion.⁹ Bequests in usufruct, however, may give rise to difficulties, and, especially, to the question of the proper interpretation of article 1499.¹⁰

i. *Validity of Bequests in Usufruct or in Naked Ownership*

Under the scheme of the Louisiana Civil Code of 1870, the disposable portion is a quantum of the deceased's patrimony, i.e., is a money value. Correspondingly, the forced portion or legitime is a money value which devolves to the heirs by operation of law.¹¹ The value of the legitime may not be diminished by "a charge or condition"¹² imposed by the testator; for example, the value of the legitime may not be burdened with a usufruct in favor of a third person, be he a spouse or a stranger. This, however, does not mean that the quantum of the legitime may not be satisfied by bequests of naked ownership in sufficient value or that a testator may not bequeath to a third person the value of the disposable portion in usufruct. Since the legitime represents a money value, and the usufruct as well as naked ownership are measured in terms of money values,¹³ the legitime ought to be satisfied by patrimonial assets, devolving in perfect ownership, naked ownership, or usufruct.¹⁴ Of course, if the

9. See LA. CIVIL CODE art. 1502 (1870): "Any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that *quantum*." By way of exception to this rule, donations between spouses in excess of the disposable quantum are null if "disguised, or made to persons interposed." *Id.* art. 1754.

10. See *Id.* art. 1499: "If the disposition made by donation *inter vivos* or *mortis causa*, be of a usufruct, or of an annuity, the value of which exceeds the disposable portion, the forced heirs have the option, either to execute the disposition or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of." *Cf.* La Civil Code art. 1486 (1825); La. Civil Code p. 214, art. 23 (1808); FRENCH CIVIL CODE art. 917.

11. See LA. CIVIL CODE arts. 1493, 1494, 1501, 1502 (1870); Comment, 37 TUL. L. REV. 710, 724, 739-52 (1963); Note, 13 LOYOLA L. J. 193, 197 (1967).

12. LA. CIVIL CODE art. 1710 (1870).

13. For the valuation of the usufruct and of the naked ownership, see Yiannopoulos, *Usufruct; General Principles: Louisiana and Comparative Law*, 27 LA. L. REV. 369, 412-18 (1967).

14. See Pascal, *Some ABC's about Trusts and Us*, 13 LA. L. REV. 555, 566 (1953): "Nothing in the legislation suggests that the legitime must be of certain kinds of interest in property; the language of the legislation indicates that a certain value fraction of the succession of a deceased person must go to his forced heirs, but nothing is said about whether that legitime must be in full ownership, usufruct or otherwise." For detailed discussion, and arguments based on functional considerations, see Note, 13 LOYOLA L. J. 193 (1967).

Section 1845 of the Louisiana Trust Estates Code provides that "an unconditional income interest in trust, without an interest in principal, payable not less than annually for a term or for the life of a beneficiary satisfies the legitime to the same extent as would a usufruct of the same property for the same term." LA. R.S. 9:1845 (1965). It is obviously assumed that a bequest of usufruct may satisfy the legitime under the Civil Code. The pro-

value of a disposition in usufruct "exceeds the disposable portion, the forced heirs have the option, either to execute the disposition or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of."¹⁵

This relatively simple, coherent, and internally consistent scheme of the Louisiana Civil Code of 1870 has been considerably blurred by jurisprudence. Faced with bequests of usufruct in favor of forced heirs, Louisiana courts have, perhaps for good reasons under the particular circumstances, allowed the heirs to recover their legitime in unencumbered ownership.¹⁶ In a recent decision, a court of appeal went a step further and declared that the legitime may not be satisfied by the devolution of property in usufruct, regardless of the value of the usufruct.¹⁷ And, as a logical corollary of this last proposition,

visions of the Trust Estates Code "dealing with the legitime in trust, seek to clarify rather than change the law." Oppenheim, *A New Trust Code for Louisiana—Act 338 of 1964*, 39 TUL. L. REV. 187, 204 (1965).

15. LA. CIVIL CODE art. 1499 (1870); *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858). See also Comment, 37 TUL. L. REV. 710, 738-52 (1963); Note, 13 LOYOLA L. J. 193 (1967). Article 1499 is not directly applicable to situations in which a testator leaves to his forced heirs the usufruct of his entire estate or the value of the legitime in usufruct. Nevertheless, this article might apply by analogy. See Note, 41 TUL. L. REV. 210, 216 (1967). Application of article 1499 by analogy would involve abandonment by forced heirs of a bequest of usufruct in their favor and claim of the legitime in unencumbered ownership. See Note, 41 TUL. L. REV. 210, 214 (1967). French courts have refused to apply article 1499 by analogy. See Cass., May 6, 1878, D. 1880.1.345, S. 1878.1.319; Cass., June 17, 1857, S. 1857.1.737. As a result, forced heirs in France may demand their legitime in unencumbered ownership as well as the testamentary disposition of the usufruct in their favor. The result has been termed "illogical." 3 PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 843 (9th ed. 1924).

16. LA. CIVIL CODE art. 1710 (1870). In *Succession of Blossom*, 194 La. 635, 194 So. 572 (1940), and in *McCalop v. Stewart*, 11 La. Ann. 106 (1856), courts attributed to forced heirs, donees of the testator's estate in usufruct, their legitime in unencumbered ownership and usufruct over the disposable portion in accordance with the will. There was neither allegation nor proof that the value of the usufruct was sufficient to satisfy the legitime. And in *Succession of Quinlan*, 118 La. 602, 43 So. 249 (1907), a bequest of usufruct in favor of the only forced heir of the testator apparently went unchallenged.

17. See *Succession of Williams*, 184 So.2d 70, 73 (La. App. 4th Cir. 1966): "Article 1493 . . . means that the child is entitled to one-third of the *property* of the disposer (not one-third of the *value* of such property) as a forced portion of which he cannot be deprived, and we know of no law which declares, or jurisprudence which holds, that the child's forced portion or legitime may be defeated, satisfied or reduced by the bequest to him of the usufruct of the estate, regardless of the value of the usufruct as compared to the value of the legitime." The *Williams* case has been criticized on several grounds. See Notes, 41 TUL. L. REV. 210 (1967); 13 LOYOLA L. J. 193 (1967); but see, Lazarus, *The Work of the Louisiana Appellate Courts for the 1965-66 Term—Donations and Testamentary Dispositions*, 27 LA. L. REV. 423, 449 (1967).

Under section 1845 of the Louisiana Trust Estates Code of 1964, "an unconditional income interest in trust, without an interest in principal . . .

other courts have recently proclaimed that bequests of usufruct to a spouse, which leave no opportunity for the satisfaction of the legitime in unencumbered ownership, infringe on the legitime, unless, of course, the legitime is burdened with a legal usufruct.¹⁸

This jurisprudence is directly in conflict with article 1499 of the Civil Code, which confers an option on the forced heirs, if the value of the usufruct exceeds the disposable portion, either to execute the donation or to abandon to the donee of the usufruct the disposable portion of the estate in perfect ownership.¹⁹ Since forced heirs may demand reduction of the donation in all cases in which the donor fails to leave the legitime in perfect ownership, the question of the value of the usufruct becomes immaterial. This interpretation avoids the necessity of an estimation of the value of the usufruct,²⁰ and, in effect, treats most bequests of usufruct as excessive at the option of the heirs.²¹ Moreover, after reduction of a donation in usufruct

satisfies the legitime to the same extent as would a usufruct of the same property for the same term." Since the provisions of the Trust Code dealing with the legitime in trust seek to clarify rather than change the general law (note 14 *supra*), the rights of forced heirs given an income interest in trust might well be determined by analogous application of article 1499 of the Civil Code. Applied to a trust disposition, article 1499 would confer on forced heirs the option, either to accept the income interest, or to claim income as well as principal interests on the part of the estate embracing the legitime; as a result, the original principal beneficiaries would be entitled to both the income and principal interests on the disposable portion of the estate. If, on the other hand, the rule of the *Williams* case were to be followed, forced heirs and income beneficiaries would be entitled to claim the income and principal interests on the portion of the estate embracing the legitime as well as the income interest on the disposable portion. For detailed discussion, see Oppenheim, *The Legitime in Trust*, 42 TUL. L. REV. 239 (1968); Comment, 37 TUL. L. REV. 710, 742-52 (1963); Note, 41 TUL. L. REV. 210, 216-17 (1967).

18. See Succession of Young, 205 So.2d 791 (La. App. 1st Cir. 1968), discussed in text at note 75 *infra*; Succession of Ramp, 205 So.2d 86 (La. App. 4th Cir. 1968), discussed in text at note 81 *infra*. These decisions, dealing specifically with article 1752 of the Louisiana Civil Code of 1870, as amended, should be restricted to their own facts. Thus, argument may be made that, if a bequest of usufruct is in favor of a stranger, the validity of the bequest ought to be determined by application of article 1499 of the Code.

19. See notes 10, 15 *supra*.

20. See Succession of Brasswell, 142 La. 948, 77 So. 886 (1918), quoted in note 66 *infra*. In France, difficulties connected with the valuation of usufructs and of naked ownerships have given rise to "most abstruse and unworkable theories." Comment, 37 TUL. L. REV. 710, 739 (1963). In Louisiana, however, the valuation of usufructs and of naked ownerships is a relatively simple matter. See Greco, *Valuation of Naked Ownerships, Usufructs, and Annuities under Louisiana Inheritance Tax Laws*, 10 LA. BAR J. 119 (1962); cf. McMAHON & RUBIN, *Pleadings and Judicial Forms Annotated*, in LA. STAT. ANN. CODE CIV. p. 11, Form No. 807 (West 1964).

21. In effect, Louisiana courts have written out of article 1499 the clause "the value of which exceeds the disposable portion." It ought to be noted, however, that this interpretation carries the weight of French doctrine and

considered by the courts to be excessive, forced heirs are seldom held to be bound to the option granted them by article 1499.²² On the contrary, heirs ordinarily receive their legitime in perfect ownership as well as the naked ownership of the disposable portion.²³

ii. Dispensation of Security

If the bequest to the surviving spouse is one in usufruct, the testator may dispense with the usufructuary's obligation to furnish security.²⁴ There should be no doubt that the dispensation of security is valid whether the usufruct is granted over the disposable portion only or over the entire estate. If the usufruct is granted over the disposable portion, the testator should have the right to dispense with security because he is free to dispose of this portion as he sees fit. If the usufruct is granted over the entire estate, and the heirs elect to execute the disposition, the dispensation of security ought to be valid as a part of the disposition that the heirs choose to execute.²⁵ If, on the other hand, the heirs decide to take their legitime in perfect ownership and abandon to the donee the disposable portion in perfect ownership, the question of security does not arise.

jurisprudence interpreting the same provision in the light of its historical derivation and intended meaning. See 11 AUBRY ET RAU, DROIT CIVIL FRANÇAIS 50 (6th ed. 1956); 3 *Planol*, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 842 (9th ed. 1942); 3 MARCADÉ, EXPLICATION THÉORIQUE ET PRATIQUE DU CODE CIVIL 465 (7th ed., 1873).

22. *Clarkson v. Clarkson*, 13 La. Ann. 422 (1858), seems to be the only reported case in which the provision of article 1499 [Article 1486 of the 1825 Code] was applied literally. See Note, 13 LOYOLA L. J. 193, 195 (1967).

23. See *Succession of Young*, 205 So.2d 791 (La. App. 1st Cir. 1968), discussed in text at note 75 *infra*; *Succession of Ramp*, 205 So.2d 86 (La. App. 4th Cir. 1968), discussed in text at note 81 *infra*. Of course, it is another question when the bequest of usufruct of an entire estate is made in favor of the forced heirs rather than the surviving spouse or a stranger. In these circumstances, article 1499 of the Civil Code does not apply directly. For an excellent discussion of the question whether forced heirs should be entitled to receive their legitime as well as testamentary dispositions in their favor, see Note, 41 TUL. L. REV. 210 (1967). Cf. *Succession of Blossom*, 194 La. 635, 194 So. 572 (1940); *McCalop v. Stewart*, 11 La. Ann. 106 (1856) (bequests of usufruct of an entire estate in favor of forced heirs; *held*, forced heirs are entitled to their legitime in unencumbered ownership as well as usufruct of the disposable portion).

24. See LA. CIVIL CODE art. 559 (1870); Yiannopoulos, *Obligations of the Usufructuary in Louisiana and Comparative Law*, 42 TUL. L. REV. 1, 13 (1967).

25. Cf. LA. CIVIL CODE art. 1499 (1870). For detailed discussion, see Yiannopoulos, *Obligations of the Usufructuary in Louisiana and Comparative Law*, 42 TUL. L. REV. 1, 13 (1967). For Louisiana decisions declaring that, under the original version of article 1752 of the Civil Code, the dispensation of security is invalid, see text at note 85 *infra*.

2. Community Property

When the forced heirs of a testator are issues of his last marriage, and the estate consists of community property, the surviving spouse may receive the usufruct of the deceased's share in the community or the disposable portion in perfect ownership as well as usufruct of the remainder. Issues of the marriage may thus receive in satisfaction of their legitime either the naked ownership of the deceased's share in the community or merely the naked ownership of the reserved portion. This result is reached by application of article 916 of the Louisiana Civil Code of 1870, as interpreted by Louisiana courts.

Article 916 declares that "in all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold a [in] usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.²⁶ The surviving spouse is thus clearly entitled to this legal usufruct when the deceased spouse died without making a will.²⁷ But when the spouse in community dies testate, the effect of particular bequests on the survivor's legal usufruct is not always certain.

Early Louisiana decisions may be taken to indicate that the mere execution of a will by the decedent amounted to a "disposition" of his share in the community which defeated the legal usufruct.²⁸ Later, however, Louisiana courts came to the

26. LA. CIVIL CODE art. 916 (1870); cf. Yiannopoulos, *Legal Usufructs in Louisiana and Comparative Law*, 14 LOYOLA L. J. 1, 3-18 (1968); Oppenheim, *The Usufruct of the Surviving Spouse*, 18 TUL. L. REV. 181 (1943); Comment, 25 LA. L. REV. 873 (1965). If there are children of a previous marriage as well as children of the last marriage, the usufruct of the surviving spouse burdens only the part of the community inherited by the children of the last marriage. Succession of Williams, 168 La. 2, 121 So. 171 (1929); Succession of Emonot, 109 La. 359, 33 So. 368 (1902); Hall v. Toussaint, 52 La. Ann. 1763, 28 So. 304 (1900); Succession of Heckert, 160 So.2d 375 (La. App. 4th Cir. 1964). Thus, the validity and effect of dispositions in favor of the surviving spouse will be determined in part under article 1752 and in part under articles 1493, 1499, and 916 of the Civil Code. Cf. Succession of Bollinger, 30 La. Ann. 193 (1878).

27. See Succession of Russell, 208 La. 213, 23 So.2d 50 (1945); Kelley v. Kelley, 198 La. 338, 3 So.2d 641 (1941); Tugwell v. Tugwell, 32 La. Ann. 848 (1880).

28. See, e.g., Succession of Schiller, 33 La. Ann. 1 (1881) (will providing for distribution of the estate among "legal heirs, according to the laws now in force in Louisiana"; held, no usufruct); Forstall v. Forstall, 28 La. Ann.

conclusion that the surviving spouse is deprived of his legal usufruct only by an *adverse* testamentary disposition.²⁹ The question of what constitutes an adverse disposition is a matter of will construction, controlled by the intention of the testator.³⁰ The courts thus ought to scrutinize the language employed in the will and the scheme of distribution in order to ascertain the intention of the testator.

When the testator exhausts his estate by bequests to third persons, or without exhausting his estate he manifests his intention that the survivor should not receive the usufruct, the disposition is adverse.³¹ Likewise, when the testator exhausts his estate by dispositions to third persons as well as to the survivor (but less than the amount of the legal usufruct) argument may be made that the testator has manifested an intention to defeat the legal usufruct by adverse disposition.³² But when the testator merely confirms the operation of the laws of intestacy,³³ when he disposes of only part of his estate without manifesting an intention that the usufruct be defeated as to the balance,³⁴ or

197 (1876) (gift to the survivor of deceased's share in the community property; *held*, bequest reduced to the disposable portion without usufruct over the remainder); *Grayson v. Sanford*, 12 La. Ann. 646 (1857) (gift to the survivor of the disposable portion; *held*, no usufruct over the remainder).

29. See, e.g., *Succession of Baker*, 129 La. 74, 55 So. 714 (1911); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888); *Succession of Brown*, 94 So.2d 317 (La. App. Orl. Cir. 1957); *Succession of Lynch*, 145 So. 42 (La. App. Orl. Cir. 1932). In *Succession of Glancey*, 112 La. 430, 36 So. 483 (1904), the deceased bequeathed by will only movable property of small value to third persons. It was held that the disposition as to the remainder was not adverse to the usufruct of the surviving spouse.

30. See LA. CIVIL CODE arts. 1712, 1713, 1715 (1870).

31. For detailed discussion of Louisiana jurisprudence, see Yiannopoulos, *Legal Usufructs in Louisiana and Comparative Law*, 14 LOYOLA L. J. 1 (1968).

32. See *Ludowig v. Weber*, 35 La. Ann. 579 (1883) (deceased husband left by will four-fifths of his community share to his four children and one-fifth to the widow; the court concluded that the survivor's usufruct did not attach to the portions inherited by the children). In cases of partial disposition of the estate in favor of the survivor, however, question arises as to whether the survivor may receive both under the will and under article 916. See text at notes 47-51 *infra*.

33. See *Succession of Maloney*, 127 La. 913, 54 So. 146 (1911); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888); *Fricke v. Stafford*, 159 So.2d 52, 53 (La. App. 1st Cir. 1963) (the testator declaring that his estate should be distributed "subject only to the usufructuary claim of my wife should she survive me as fixed by law in her favor").

34. Intestacy may be only partial. If, for example, the deceased spouse disposed of only a portion of his share in the community, the usufruct of the surviving spouse may attach to the undisposed of portion. In *Succession of Glancy*, 108 La. 414, 422, 32 So. 356, 359 (1902), the court declared to the point that "if by his will he has disposed of certain specific property, and no more, in full ownership, that particular property would pass out of the succession by the legatee, free from the usufruct, but the usufruct would attach to the balance . . . The cutting off of the usufruct would be measured exactly by what had been disposed of by the deceased spouse to the prejudice of the usufruct, and inconsistent with it."

when he gives to the survivor more than he would have taken if decedent had died intestate, the disposition is not adverse.³⁵

i. Confirmation of the Legal Usufruct

According to well-settled Louisiana jurisprudence, testamentary dispositions which are not adverse to the interests of the surviving spouse confirm the legal usufruct of article 916.³⁶ Moreover, this confirmation of the legal usufruct may be made by express disposition.³⁷

Since the rules applicable to legal usufructs differ in certain essentials from the rules applicable to testamentary usufructs, question arises as to the nature of a legal usufruct that has been confirmed by will. It might be argued that the confirmation should not convert the legal usufruct into a testamentary one. Louisiana courts, however, have declared that the confirmed usufruct becomes testamentary for certain purposes but remains legal for other purposes. In connection with the issue of termination of the usufruct, Louisiana courts have held that the usufruct becomes testamentary and does not terminate upon remarriage.³⁸ For purposes of taxation, however, Louisiana courts have reached the opposite conclusion and have declared that the confirmation of the legal usufruct by will is not sufficient to change its nature.³⁹ Accordingly, the survivor is not liable for the payment of inheritance taxes.⁴⁰ Further, the survivor's usufruct, though confirmed by will, is "legal" rather than testa-

35. See *Winsberg v. Winsberg*, 233 La. 67, 56 So.2d 444 (1957); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888).

36. See note 33 *supra*.

37. It was early recognized that the legal usufruct could be confirmed by will. In *Grayson v. Sanford*, 12 La. Ann. 646, 647 (1857), the court stated: "As the Act of 1844 only gives the right of usufruct in the portion of the community coming to the deceased, when he has left no will, it is clear that he can give, by his testament, the usufruct of said portion, which would belong to the surviving widow, without any will, or can declare that in the event of a particular contingency, his widow shall inherit the portion of the property, which the law authorizes him to bequeath."

38. See *Succession of Carbajal*, 154 La. 1060, 98 So. 666 (1924); *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908). In the first case, the testator had clearly confirmed a usufruct that would have been established under article 916. Accordingly, argument might be made that this usufruct ought to terminate upon remarriage. In the second case, however, there would have been no usufruct in the absence of the will since the children of the testator were issues of a former marriage. This usufruct was clearly testamentary.

39. See *Succession of Baker*, 129 La. 74, 55 So. 714 (1911); *Succession of Brown*, 94 So.2d 317 (La. App. Orl. Cir. 1957); *Succession of Lynch*, 145 So. 42 (La. App. Orl. Cir. 1932); *cf.* *Succession of Norton*, 157 So.2d 909 (La. App. 1st Cir. 1963).

40. See *Yiannopoulos, Usufruct: General Principles: Louisiana and Comparative Law*, 27 LA. L. REV. 413-18 (1967).

mentary for the determination of the legitime⁴¹ and, presumably, for the dispensation of security.⁴²

It is submitted that the question of the nature of a usufruct confirmed by will ought to be resolved in the light of the intention of the testator. If the testator intended to give to the survivor the same rights that the law would have accorded him in the absence of a will, the survivor's usufruct is legal. If, on the other hand, the intention of the testator was to alter the scheme of intestate succession and to give to the survivor additional rights, the usufruct ought to be classified as testamentary. When a usufruct is granted in circumstances under which article 916 is inapplicable, i.e., over separate property of the deceased or over community property inherited by persons other than issues of the marriage, there should be no doubt that such usufruct is testamentary.⁴³

As the law stands today, a simple confirmation of the legal usufruct by will does not deprive the survivor of any of the advantages of the legal usufruct; on the contrary, according to the jurisprudence, it confers the additional advantage that this usufruct may not terminate upon remarriage. Testators who wish to reach this result, however, should be encouraged to spell it out in order to preclude proceedings for the construction of the will.

ii. Cumulation of Rights Under Article 916 and Under the Will

Testamentary dispositions not adverse to the interests of the surviving spouse, or expressly in favor of that spouse, give rise to the question of whether the survivor may receive both under article 916 of the Louisiana Civil Code of 1870 and under the will.

41. Cf. *Winsberg v. Winsberg*, 233 La. 67, 56 So.2d 444 (1957); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1883); text at notes 49-51 *infra*.

42. See *Winsberg v. Winsberg*, 233 La. 67, 56 So.2d 444 (1957); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888). The question of security was not raised in these cases. These cases, however, are founded on the doctrine that a testament granting to the surviving spouse a usufruct over assets of the community inherited by issues of the marriage merely confirms the legal usufruct of article 916. It ought to follow, therefore, that no security is due: Parents having any kind of legal usufruct over property of their children are relieved by law of the obligation to furnish security.

43. This usufruct does not terminate upon remarriage. *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908). The usufructuary owes taxes. *Succession of Eismann*, 170 So.2d 913 (La. App. 4th Cir. 1965). And the survivor, in the absence of testamentary dispensation, must furnish security. See *Succession of Carlisi*, 217 La. 675, 47 So.2d 42 (1950); *Maguire v. Maguire*, 110 La. 279, 34 So. 443 (1903); *Succession of Cardona*, 14 La. Ann. 356 (1859).

When the testator gives to the survivor the *disposable portion*, without mentioning usufruct, the question ought to be resolved in the light of the intention of the testator, gathered from the language in the will and the scheme of distribution. In the absence of other indication, such a disposition should not be regarded as adverse, designed to defeat the legal usufruct under article 916. Indeed, it may be said that the testator disposed of only part of his estate and that the partially undisposed of portion should devolve according to the rules of intestate succession.⁴⁴ In *Grayson v. Sanford*,⁴⁵ the will read: "I give and bequeath to my wife . . . the use of my property, both personal and real, during her life. However, if any of my children should sue for partition during her life, I then will and bequeath to her all of the property that I can dispose of by law, forever." Upon suit by the children for partition, the court held that the widow should be limited to the disposable portion, without usufruct over the remainder. The case was subsequently distinguished⁴⁶ and must be regarded as overruled by recent jurisprudence.⁴⁷ Thus, today, the survivor should be entitled to both the disposable portion in perfect ownership and the usufruct of the remainder of the community under article 916, unless the court could gather from the will that the intention of the testator was to defeat the usufruct. It follows, therefore, that the testator may by express provision give to the surviving spouse the disposable portion in perfect ownership and usufruct over the remainder.

When the intention of the testator to give *both the disposable portion in perfect ownership and the usufruct of the remainder* is established, it might be argued that the disposition violates the legitime of forced heirs. It has been early established, however, that in such a case the testament merely confirms the operation of article 916 and makes provision as to the property

44. See Succession of Glancy, 108 La. 414, 422, 32 So. 356, 359 (1902): "If the deceased left the survivor the full ownership of certain property, he or she would take that, holding the balance of his share in usufruct. If he left a legacy to a third person, payable out of the revenues of either the whole of his share in the community property, or of a particular or specific part of it, the survivor would take the usufruct, but with the charge upon it making payments of the legacy out of the revenues to the extent; the legatee having the right to make his legacy available by and through the usual remedies."

45. 12 La. Ann. 646 (1857).

46. Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).

47. See *Winsberg v. Winsberg*, 233 La. 67, 56 So.2d 444 (1957), note 51 *infra*.

that is freely disposable in perfect ownership. In *Succession of Moore*,⁴⁸ the deceased had left to the widow the disposable portion in perfect ownership and usufruct of the remainder. Over arguments by heirs that their legitime had been infringed upon, the court concluded that since an encumbrance placed by law on the legitime could not violate article 1710, neither could a mere confirmation of such encumbrance.⁴⁹

When the testator leaves his entire estate to the survivor in perfect ownership, the disposition violates the legitime of forced heirs and is reduced to the disposable portion.⁵⁰ But, according to Louisiana jurisprudence, article 916 continues to operate and the survivor receives, in addition to the disposable portion, the usufruct over the portion inherited by children of the marriage. In *Winsberg v. Winsberg*,⁵¹ a legacy of the decedent's entire estate to the surviving spouse was reduced to the disposable portion. But, after reduction of the universal legacy to the spouse, the usufruct under article 916 attached to the forced portion. The prohibition of article 1710, the court reasoned, was not violated when the usufruct was given by operation of law and confirmed by will.

In the light of the foregoing, the legal situation in Louisiana today may be summarized as follows. In the presence of issues

48. 40 La. Ann. 531, 4 So. 460 (1888).

49. See also *Succession of Baker*, 129 La. 74, 55 So. 714 (1911), involving questions of liability for inheritance taxes. The testator had given to his wife the disposable portion of his estate in perfect ownership and usufruct of the remainder. The court imposed tax on the disposable portion which came to the widow by way of inheritance and declared that no taxes were due on her usufruct over one-third of the deceased's share of the community, the part inherited by the sole forced heir. The court assumed, without discussion, that the widow received both the disposable portion in perfect ownership and usufruct of the remainder. Cf. *Succession of Brown*, 94 So.2d 317 (La. App. Orl. Cir. 1957).

50. See *Winsberg v. Winsberg*, 233 La. 67, 56 So.2d 444 (1957); *Succession of Heckert*, 160 So.2d 375 (La. App. 4th Cir. 1964). For the determination of the disposable portion, excessive inter vivos donations to the survivor are fictitiously returned to the mass from which they came, i.e., the separate property of the deceased or the mass of the community. The survivor, however, not being an heir, is not required to collate if the donations exceed the disposable portion. See *Succession of Moore*, 42 La. Ann. 332, 7 So. 561 (1890).

51. 233 La. 67, 96 So.2d 44 (1957), noted in 18 LA. L. REV. 574 (1958); 32 TUL. L. REV. 328 (1958). In *Forstall v. Forstall*, 28 La. Ann. 197 (1897), a donation by the testator of all his property to the surviving spouse was reduced to the disposable portion. The court reasoned, further, that any disposition by the testator of his interest in the community nullified the operation of article 916, so that the spouse was entitled either to the disposable portion or to the usufruct of the forced portion, since the former was all that the testator could legally donate. The *Forstall* case was expressly overruled in *Winsberg v. Winsberg*, *supra*.

of the marriage, the maximum that a testator may give to the surviving spouse out of his share in the community is either usufruct over that share or perfect ownership of the disposable portion plus usufruct over the remainder. The granting of a usufruct over the deceased's share in the community inherited by issues of the marriage confirms the operation of article 916; this disposition gives rise to a usufruct governed in part by the rules applicable to legal usufructs and in part by the rules applicable to testamentary usufructs. The granting of the disposable portion in perfect ownership plus usufruct over the remainder involves, according to the jurisprudence, disposition of freely disposable property and, in part, confirmation of the legal usufruct of article 916. If the testator attempts to give to the survivor in perfect ownership more than the laws of forced heirship allow, the excessive donation will be reduced to the disposable portion which will devolve to the surviving spouse in perfect ownership. In addition, however, the surviving spouse will receive the usufruct over the forced portion inherited by issues of the marriage. But if the testator makes an excessive disposition in favor of a person other than the surviving spouse, the survivor's legal usufruct is defeated to the extent that this disposition exhausts the estate.⁵² As to undisposed of assets, the legal usufruct of the survivor may or may not attach, depending on the intent of the testator.

3. *Separate and Community Property*

Whether his estate is composed of separate property, community property, or of both, a testator may, in the presence of issues of the marriage, give to the surviving spouse the disposable portion in perfect ownership.⁵³ In addition, the testator may confirm by will the legal usufruct of the surviving spouse over one-half of the community property inherited by issues of the marriage.⁵⁴ But the testator may not burden with a usufruct the legitime of forced heirs over his separate property.⁵⁵

An excessive disposition in favor of the surviving spouse

52. If the disposition of the entire estate is made in favor of a person other than the survivor, and this disposition is reduced to the disposable portion, it is clear that the usufruct does not attach to the property bequeathed to that person. And it ought to be equally clear that the usufruct does not attach to the forced share inherited by children of the marriage after reduction of the excessive donation. The intention of the testator to make an adverse disposition is clear.

53. See text at notes 8, 48 *supra*.

54. See text at notes 33, 37 *supra*.

55. See text at notes 72, 15 *supra*.

will be reduced to the disposable portion. If the disposition is in perfect ownership, reduction will be made according to article 1493 of the Louisiana Civil Code of 1870; if the disposition is in usufruct, reduction will be made, at the option of the heirs, according to article 1499. In either case, after reduction, the surviving spouse will be entitled to the disposable portion in perfect ownership and to the legal usufruct under article 916.

The above principles may be regarded as settled, although their application to certain factual situations has not been fully tested in Louisiana. There should be no doubt that the quantum of the disposable portion must be figured on the entire mass of the succession, consisting of separate property, the deceased's share in the community, and the value of inter vivos donations subject to collation.⁵⁶ But doubts may exist as to the method by which the bequest to the surviving spouse will be satisfied. Will it be satisfied out of community property, separate property, or proportionately out of both? The method of satisfaction of the bequest to the surviving spouse may be very important. For example, if an estate is composed of separate property valued at \$50,000 and of the deceased's share in the community valued at \$50,000, and there are two children, the disposable portion is \$50,000. If the bequest to the surviving spouse were to be satisfied out of community assets first, the legatee would receive \$50,000 in perfect ownership and the heirs \$50,000 out of separate property in perfect ownership. If the bequest were to be satisfied out of separate property first, the surviving spouse would receive \$50,000 in perfect ownership and \$50,000 in usufruct over the deceased's share in the community.

In *Succession of Moore*,⁵⁷ the court considered this problem and issued guidelines. In this case, the deceased had left to his widow the disposable portion in perfect ownership and usufruct

56. See LA. CIVIL CODE art. 1505 (1870); *Succession of Moore*, 40 La. Ann. 531, 4 So. 460 (1888); Comment, 37 TUL. L. REV. 710, 734 (1963).

57. 40 La. Ann. 531, 541, 4 So. 460, 465 (1888): "After payment of the debts and charges against his estate . . . the net revenue must be divided into three equal parts. The first third should be composed of the separate property of Mr. Moore, and in addition of such portion of his share in the community as may be necessary to complete that third. Out of this third must be deducted the two legacies of \$10,000, and the residue of the third will accrue to Mrs. Moore in full satisfaction of the legacy of the disposable portion made to her by her husband . . . Next, Mrs. Moore will be entitled to the usufruct of the remaining share of the deceased in the community during her widowhood, under the law, as confirmed by the will; and, finally, the portion of the estate of the deceased as shall be thus subjected to the usufruct of Mrs. Moore shall be deemed as the *legitime*, accruing in naked ownership to the nine children, as forced heirs of the deceased."

of the remainder of his estate. The estate was composed of the deceased's share in the community (valued at \$245,000) and of separate property (valued at \$7,000). The court found that, since the testator was survived by more than three children, the disposable portion was one-third of his estate. The bequest of the disposable portion to the widow ought to be satisfied, according to the court, out of separate property and of so much of the deceased's share in the community as might be needed to make up one-third of the mass of the succession. In addition, the widow ought to receive the usufruct over the remainder of the deceased's share in the community inherited by issues of the marriage. The children were thus attributed the forced portion in naked ownership.

It is submitted that this method of satisfaction of the bequest of the disposable portion confers on the surviving spouse an unfair advantage to the prejudice of the children. A much fairer solution would be to satisfy the bequest of the disposable portion proportionately out of separate property and community property.⁵⁸ Under the facts of the *Moore* case, the widow should receive one-third of the separate property in perfect ownership and likewise one-third of the community property in perfect ownership. The children would then receive two-thirds of the separate property of their deceased father in perfect ownership and two-thirds of his share in the community in naked ownership, in accordance with the letter and spirit of article 916, as interpreted by Louisiana courts.

II. DISPOSITIONS IN FAVOR OF THE SURVIVING SPOUSE AND THE LEGITIME OF ISSUES OF A FORMER MARRIAGE

When the forced heirs of a spouse are issues of a former marriage, the validity and effect of testamentary dispositions in favor of the surviving spouse are matters governed by article 1752 of the Louisiana Civil Code of 1870, in combination with article 1493 of the same Code. There are no complications arising out of article 916, and the nature of the deceased's property is immaterial; but questions may arise as to the relevance of article 1499, if the disposition in favor of the surviving spouse is one in usufruct.

Originally, article 1752 provided that a testator could not

58. In this respect, article 1511 of the Louisiana Civil Code of 1870 should apply by analogy. This article declares that "When the dispositions *mortis causa* exceed . . . the disposable *quantum* . . . the reduction shall be made *pro rata*."

give to his spouse of a second marriage more than one-fifth of his estate in usufruct if he was survived by children of a former marriage.⁵⁹ This article was amended in 1882 to read that "a man or a woman, who contracts a second marriage, having children by a former one, can give to his wife, or she to her husband, either by donation or by last will and testament, in full property, or in usufruct, not exceeding one third of his or her property."⁶⁰ The article was again amended in 1916 to read that a spouse having children of a former marriage may give to the surviving spouse of the last marriage "in full property or in usufruct, all of that portion of his estate, or her estate, as the case may be, that he or she could legally give to a stranger."⁶¹ Thus, today, article 1752 must be interpreted in the light of article 1493 which fixes the disposable portion in general; and the quantum of the disposable portion is the same whether the bequest is made to the surviving spouse of a second marriage or to a stranger.

1. *Validity of Bequests in Usufruct or in Naked Ownership*

Application of article 1752 to bequests in perfect ownership does not involve difficulties. If the disposition in favor of the surviving spouse does not exceed the disposable portion, it will be given effect. If the disposition exceeds the disposable portion, it will be reduced to the quantum specified in article 1493. Bequests of usufruct, however, may give rise to difficult problems, and, especially, to the question whether article 1752 should or should not be interpreted in combination with article 1499.⁶²

In *Succession of Brasswell*,⁶³ the testator gave to his second wife the usufruct of his entire estate, and to his six children, issues of a former marriage, the naked ownership. The children brought action for the reduction of the bequest to their step-mother to the usufruct of one-third of the estate, in conformity with article 1752 of the Civil Code, as amended by act 14 of 1882.⁶⁴ The widow claimed that the case was governed by article 1499 of the Civil Code and that the disposition in her favor should be reduced, at the option of the heirs, to the disposable

59. See LA. CIVIL CODE art. 1752 (1870): "A man or a woman who contracts a second or subsequent marriage, having children by a former one, can give to his wife, or she to her husband, only the least child's portion, and that only as a usufruct; in no case shall the portion, of which the donee is to have the usufruct, exceed the fifth part of the donor's estate"; La. Civil Code art. 1745 (1825); La. Civil Code p. 258, art. 226 (1808); FRENCH CIVIL CODE art. 1098.

60. LA. CIVIL CODE art. 1752 (1870), as amended, La. Acts 1882, No. 13.

61. *Id.* art. 1752 (1870), as amended, La. Acts 1916, No. 116.

62. See note 10 *supra*.

63. 142 La. 948, 77 So. 886 (1918).

64. See text at note 60 *supra*.

portion in perfect ownership.⁶⁵ In a well-considered opinion, the court held that the disposition should be reduced to one-third of the estate in usufruct. Article 1499 of the Civil Code, the court reasoned, was indispensable for the practical application of article 1493.⁶⁶ But in contrast with article 1493 "which fixes the disposable quota as between persons in general, article 1752, which fixes the disposable quota as between spouses, does within itself, by its own text, furnish a rule, or the means, for determining whether the disposable portion has been exceeded in the case of a bequest of usufruct; hence an estimation such as that which would have been necessary for the practical operation of article 1493 . . . could not have been designed to operate in connection with article 1752. In connection with article 1752, there was no necessity or reason for it."⁶⁷

One may agree or disagree with the formal reasoning of the court in the *Brasswell* case. On the basis of a literal interpretation of article 1752, as it then stood, one might well reach the conclusion that "one third may be given, and that this third

65. See Succession of Brasswell, 142 La. 948, 951, 77 So. 886, 888 (1918): "The learned counsel for the widow would interpret this article 1752 as reading that a usufruct may be given equal in value to one-third of the estate in full ownership." The same argument was made, forty years later, in Succession of Young, 205 So.2d 791 (La. App. 1st Cir. 1968). See text at note 77 *infra*.

66. See Succession of Brasswell, 142 La. 948, 950, 77 So. 886, 887 (1918): "This article [1493], in fixing the disposable quota, speaks of full ownership only, saying nothing of usufruct or annuity, so that it furnishes no rule or means for determining whether the disposable quota has been exceeded or not when the bequest consists not of the full ownership, but of the usufruct only, or of an annuity; and therefore, if this article stood alone, the question of excess vel non in the case of a donation of usufruct or annuity would have to be determined by means of an estimation of the value of the usufruct or annuity as compared with that of full ownership. Usufruct ends with the life of the usufructuary; hence, in making such an estimation, the age, constitution, the sex, the health, and incidentally the past life and habits, of the usufructuary or annuitant, would have to be taken into consideration. How unreliable, unsatisfactory, and disagreeably inquisitorial would be an estimation based upon elements so personal and difficult of appreciation as these it is easy to understand; and it is therefore easy to understand how the advisability of providing some rule for avoiding the necessity of having recourse to such an estimation would at once suggest itself. Out of that necessity was born said article 1499, which provides such a rule." This line of reasoning was certainly pertinent at the time the *Brasswell* case was decided. Today, however, "in view of the statistical reliability of modern actuarial tables, the French rejection of an attempt to calculate present market value of the interest in question is perhaps a bit unrealistic." Comment, 37 TUL. L. REV. 710, 741 (1963). Courts make frequent use of actuarial tables in determining liability for taxes, and there is no reason why these tables should not be used for ascertaining the value of a bequest in usufruct or in naked ownership for the satisfaction of the legitime. Cf. Yiannopoulos, *Usufruct; General Principles in Louisiana and Comparative Law*, 27 LA. L. REV. 369, 416 (1967).

67. 142 La. 948, 950, 77 So. 886, 887 (1918).

may be given in full ownership or in usufruct. It can be given in no other form; not in the form of an annuity."⁶⁸ Further, it ought to be noted, that the opinion purported to carry the weight of French doctrine and jurisprudence interpreting the corresponding provision in the Napoleonic Code in the light of its historical derivation and intended meaning.⁶⁹ But grave doubts may exist as to the validity of the *Brasswell* case as a precedent after the amendment of article 1752 by act 116 of 1916.

In *Succession of McLellan*,⁷⁰ decided under the present version of article 1752, the testator had left to his wife of a second marriage the disposable portion of his estate in perfect ownership and usufruct over the remainder. The mass of the succession consisted entirely of the deceased's share in the community but article 916 of the Civil Code was inapplicable; hence, the testator's children of a former marriage brought suit for the reduction of the donation to the disposable portion. Under the authority of the *Brasswell* case, the children claimed that "the decedent could give in full property or in usufruct, but not both."⁷¹ Counsel for the widow argued, however, that "Article 1752 had been amended since the decision of the *Brasswell* case and, therefore, the case is not applicable."⁷² The court rightly reduced the bequest in favor of the surviving spouse to the disposable portion in perfect ownership and attributed to the children their legitimate likewise in perfect ownership. The court grounded its decision on the authority of the *Brasswell* case, declaring that the portion of article 1752 applicable to this case has not been changed. Therefore, the widow was entitled "to the usufruct

68. *Id.* at 951, 77 So. at 888.

69. *Id.*: "[T]he same question precisely arose in France which is presented in this case, namely, whether the children are limited to the option provided for in article 1499 (917, C.N.) or may require the usufruct to be reduced to the quota specified in the article fixing the disposable quota as between spouses; and every word that is found in the decisions of the French courts and in the books of the French commentators on the question is applicable here." It ought to be noted, however, that the court followed, erroneously, French doctrine and jurisprudence dealing with donations of usufruct to a spouse in the presence of issues of the marriage. As to these donations, governed by article 1094 of the Code Civil (corresponding to article 1746 of the Louisiana Civil Code of 1870), article 917 was inapplicable. But as to donations to a spouse of a second marriage, governed by article 1098 of the Code Civil (corresponding to article 1752 of the Louisiana Civil Code of 1870), French courts have always applied article 917. See, e.g., Req., May 30, 1905, D.1908.1.166, S.1907.1.125, Req., July 1st, 1873, D.1874.1.26, S.1874.1.17; Req., April 1, 1844, S.1844.1.844; 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 199 (2d ed. Trabot et Loussouarn 1957).

70. 144 So.2d 291 (La. App. 4th Cir. 1962).

71. *Id.* at 295.

72. *Id.*

of the property or to the disposable portion in [perfect] ownership, but not both."⁷³

It is submitted that the case was rightly decided, but for the wrong reasons. The *Brasswell* case was clearly distinguishable; it involved an excessive donation of usufruct rather than a donation of the disposable portion in perfect ownership and usufruct of the remainder. Moreover, the subsequent amendment of article 1752 has, indeed, materially altered the entire scope of this provision and the authority of the *Brasswell* case is at best questionable today.⁷⁴ But, be that as it may, the disposition in favor of the surviving spouse in *Succession of McLellan* was excessive and should be reduced by direct application of articles 1710 and 1499 of the Civil Code. Under the first article, the legitime of forced heirs may not be burdened with a usufruct and under the second article the heirs have the option to abandon to the legatee of the usufruct the disposable portion and claim their legitime in perfect ownership.

The question whether article 1752 of the Civil Code should be interpreted in the light of article 1499 of the same Code seemed to be a relevant issue in *Succession of Young*.⁷⁵ In this case, the testator left to his widow of a second marriage the usufruct of his entire estate and to his daughter, issue of a former marriage, the naked ownership. The daughter, citing article 1752, claimed that the testator could "bequeath his second spouse only the disposable portion of his estate, either in full ownership or usufruct, and where the legitime of the forced heir is impinged upon under such circumstances the bequest in favor of the second spouse must be reduced."⁷⁶ As authorities for these propositions, the claimant cited the *Brasswell* and the *McLellan* cases. The widow, on the other hand, claimed that under the authority of the *McLellan* decision "the surviving spouse is entitled to either the usufruct of all the decedent's property or the disposable portion in naked ownership, but not both." Since, in this case, "only the usufruct of the decedent's estate was bequeathed and since the value of the usufruct does

73. *Id.* The court declared that "the defendant herein is entitled to the usufruct of the property or the disposable portion in *naked* ownership, but not both." (Emphasis added.) The court obviously meant "perfect" rather than "naked" ownership, and the apparent typographical error is corrected in text.

74. See text at note 80 *infra*.

75. 205 So.2d 791 (La. App. 1st Cir. 1968).

76. *Id.* at 795.

not exceed the value of the disposable portion of decedent's estate, the bequest is not subject to reduction."⁷⁷

The court distinguished *McLellan* on the ground that the testator in that case had left to the widow both the disposable portion in perfect ownership and usufruct of the remainder, and followed *Brasswell* because the factual situation in that case was identical to the case at bar. Accordingly, the court reduced the disposition in favor of the surviving spouse to the usufruct of the disposable portion and attributed to the child its legitime in perfect ownership as well as the naked ownership of the disposable portion.⁷⁸ The court thus rejected the widow's argument that the usufruct should be maintained on the entire estate since the value of that usufruct did not exceed the value of the disposable portion. In the first place, the court observed, the value of the usufruct had not been disclosed by the record; but even if that value had been disclosed, the court was of the opinion that "in plain unambiguous language, Article 1752, *supra*, states the testator may leave the surviving spouse, in full ownership or in usufruct all that the testator could leave to a stranger. It does not, as appellee contends, permit the bequest of usufruct to the value of the disposable portion but rather authorizes the giving of the disposable portion in usufruct."⁷⁹ One may agree with this literal interpretation of article 1752 of the Civil Code. It does not expressly allow dispositions in usufruct up to the value of the disposable portion. But neither compels reduction of the donation to the disposable portion in usufruct.

In its pre-1916 version, article 1752 contained a rule for the determination of the disposable portion, in perfect ownership or in usufruct, without reference to any other articles in the Code. Today, however, article 1752 declares that the testator may give to his spouse of a second marriage the same portion of his property that he may give to a stranger. Hence, by neces-

77. *Id.*

78. *Id.* at 797: "Of said amount [\$12,888.14], the sum of \$4,296.04 represents the legitime of appellant Margaret M. Flair to which she is entitled in full ownership free of the usufruct granted appellee Jessie G. Young. The remaining two-thirds of decedent's succession amounting to the sum of \$8,592.10 constitutes the disposable portion of the estate and is inherited by appellant in naked ownership subject to the usufruct thereon in favor of appellee."

79. *Id.* at 795. The proposition is relevant in the context of a situation governed by article 1752 of the Civil Code. It should not be extended to situations in which a bequest of usufruct is made in favor of persons other than the surviving spouse of a second marriage. See note 18 *supra*.

sity, the rights of a forced heir of a former marriage must be determined as if the excessive donation in favor of the surviving spouse had been made to a stranger. If the disposition is in perfect ownership, its validity and effect will have to be determined in the light of article 1493; and if the disposition is in usufruct, its validity and effect will have to be determined in the light of the option granted to forced heirs by article 1499. It is true that article 1499, as interpreted in Louisiana and in France, grants to forced heirs the option to demand reduction of the donation in usufruct, without estimation of the value of the usufruct.⁸⁰ But, if the forced heirs exercise their option to demand reduction of the donation, they must abandon to the legatee of the usufruct, be he a surviving spouse of a second marriage or a stranger, the disposable portion in perfect ownership. The issues of a former marriage have no right to demand reduction of the donation to the disposable portion in usufruct. Application of article 1499, as suggested, would in most cases produce results compatible with the intention of a testator who wishes to bequeath to the surviving spouse of his last marriage the maximum that the law allows. The bequest of the usufruct of an entire estate may well be taken to establish that intention. The original scheme of distribution devised by the testator may not be carried out because the law accords to children their option under article 1499. But, under this article, the surviving spouse is accorded the same benefits that the testator himself could have granted if he had foreseen that his children would attack the will.

Nevertheless, Louisiana courts continue to reduce excessive donations in favor of a surviving spouse of a second marriage as if article 1499 did not exist. In *Succession of Ramp*,⁸¹ testator was survived by his widow of a third marriage and by legitimate descendants of the first and second marriages. He bequeathed to his widow the usufruct of his entire estate, consisting of both separate and community property, and to his children their legitime in naked ownership. The children of the second marriage attacked the will on the grounds that their father lacked mental capacity to make a will and that he and his third wife lived together without having been legally married. Subsequently, however, these children entered into an agreement with the widow by which they bound themselves to dismiss

80. See text at notes 16-18 *supra*.

81. 205 So.2d 86 (La. App. 4th Cir. 1968).

their action for the annulment of the will and to accept the succession of their father in conformity with the will. Near the end of the administration, however, the children employed new counsel and claimed that that "the will impinged upon their forced portion, contrary to Civil Code articles 1493 and 1499, in view of the fact that their forced portion was burdened with a usufruct in favor of the decedent's third wife."⁸² The lower court held that the child of the first marriage, who had not signed the settlement, should receive its legitime in perfect ownership; but the children of the second marriage were bound by the terms of the agreement they had signed. From the judgment against them, the children of the second marriage appealed.

On appeal, the children claimed that the agreement they had signed and homologated was subject to rescission on the ground of lesion beyond one-fourth of the true value of the property. The court of appeal granted the children's request for rescission. Following this determination, the court declared that all children were entitled to their legitime unencumbered by the usufruct of the surviving spouse. "The law is well settled," the court announced, "that . . . an heir is entitled to receive his forced portion free of any usufruct whatsoever, with the exception of the usufruct of the surviving spouse provided for in article 916 of the Civil Code. It is clear in this instance, however, that article 916 is not applicable."⁸³ As a result, the children received their legitime in unencumbered ownership as well as the naked ownership of the disposable portion—contrary to the letter and spirit of article 1499 of the Civil Code.

In conclusion, one may observe that the *Brasswell* case was correctly decided under the pre-1916 version of article 1752, but the decision should no longer be considered as authority for the proposition that a bequest of the usufruct of an entire estate in favor of the surviving spouse of a second marriage must be reduced to the usufruct of the disposable portion. The *McLellan* case was correctly decided since the situation did not call for direct application of article 1499. The *Young* and *Ramp* cases should have been decided by reference to article 1499 which, at least in *Ramp*, had been brought to the attention of the court; and the legatees of the usufruct should have been given, at the option of the heirs, either the testamentary disposition or the disposable portion in perfect ownership. Under

82. *Id.* at 88.

83. *Id.* at 89.

the actual state of the jurisprudence, testators who wish to confer on the surviving spouse of a second marriage the maximum benefits permitted by the law should be advised to bequeath the disposable portion in perfect ownership. An excessive donation in usufruct may be reduced to the disposable portion in usufruct, and, the surviving spouse of a second marriage may receive less than the maximum allowed by the law or the maximum that the testator intended to bequeath. Reason and amendments to article 1752 notwithstanding, *Succession of Brasswell* is likely to rule us for times to come.

2. Dispensation of Security

According to the general law, a testator may dispense with the obligation of the usufructuary to furnish security⁸⁴ but doubts have been expressed as to the validity of dispensation when a bequest of usufruct is made to the surviving spouse of a second marriage.

Under article 1745 of the Louisiana Civil Code of 1825, and original article 1752 of the Louisiana Civil Code of 1870, a donor could not give to his spouse of a second marriage more than one-fifth of his estate in usufruct if he was survived by children of a former marriage. In these circumstances, since the usufruct burdened property inherited in naked ownership by forced heirs, argument could be made that the dispensation of security was invalid. In *Depaz v. Riez*,⁸⁵ testator had left to his widow all that the law permitted him to dispose of in her favor in perfect ownership or in usufruct, at her choice, dispensing with security in case she elected to take the usufruct. Since the testator had been survived by a son by a former marriage, the court held that the widow was entitled to the usufruct of one-fifth of the testator's estate subject to her obligation to furnish security. "Article 1845 of the Civil Code," the court declared, "forbids testators to dispose of the legitimate portion to the prejudice of their descendants, and art. 552, which authorizes them to dispense the usufructuaries from giving security, must be construed with reference to that prohibition. The power to place the property, forming part of the legitimate portion, in the possession of the usufructuary, without such security as will ensure its return at the expiration of the usufruct, would enable

84. See LA. CIVIL CODE art. 559 (1870); Yiannopoulos, *Obligations of the Usufructuary in Louisiana and Comparative Law*, 42 TUL. L. REV. 1, 12 (1967).

85. 2 La. Ann. 30 (1847).

testators to evade a regulation of public order. Such a power cannot exist."⁸⁶

It is submitted that this solution is no longer valid after the amendment of article 1752 of the Louisiana Civil Code of 1870 by the Acts of 1882 and 1916.⁸⁷ Under the original version of article 1752, a usufruct in favor of the surviving spouse of a second marriage might be regarded as a burden on the legitime of forced heirs, issues of a former marriage. Today, however, a testator may give to his surviving spouse of a second marriage, in full ownership or in usufruct, the same portion of his estate that he may give to a stranger. Thus, a bequest of the disposable portion in usufruct does not burden the children's legitime; the children inherit the naked ownership of the disposable portion by the effect of the will rather than by necessity of law. And, since the testator is allowed to give to his second wife the disposable portion in perfect ownership, he should *a fortiori* be allowed to give it in usufruct without security: "who can do more can do less."⁸⁸ If the bequest of the usufruct is excessive and is reduced at the option of the heirs under article 1499, the question of security does not arise; and if an excessive donation of usufruct is executed by the heirs, the dispensation of security ought to be valid as a part of the disposition that the heirs choose to execute.⁸⁹

In the light of the foregoing, spouses of a second marriage who wish to bequeath to the surviving spouse the disposable portion of their estates in usufruct rather than in perfect ownership may, if they so wish, dispense with security. In the absence of dispensation, the courts will require security in accordance with the general law.⁹⁰

86. *Id.* at 43. In *Succession of Bollinger*, 30 La. Ann. 193 (1878), an excessive donation to the surviving spouse was likewise reduced to the disposable portion under original article 1752 of the Louisiana Civil Code of 1870, i.e., to one fifth of the testator's estate in usufruct. After reduction, the court imposed on the widow the duty to furnish security as to property inherited in naked ownership by children of a former marriage. Since the testator had not dispensed with security by will, the decision is correct both under the old and the new version of article 1752.

87. See text at notes 60, 61 *supra*.

88. *Succession of Moore*, 40 La. Ann. 531, 537, 4 So. 460, 462 (1888).

89. See text at note 25 *supra*. If the heirs decide to take their legitime in full ownership and abandon to the donee the disposable portion likewise in naked ownership, forced portions may be subjected to usufruct only under the terms of article 916 of the Civil Code; but this article is inapplicable to forced heirs of a former marriage. See text at note 26 *supra*.

90. See *Succession of Young*, 205 So.2d 791 (La. App. 1st Cir. 1968).